United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1238

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Appellant,

v.

LANI M. BROZYNA,
Defendant-Appellant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLEE-APPELLANT

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United States Court of Appeals

For the Second Circuit

Docket No. 77-1238

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Appellant,

v.

LANI M. BROZYNA,
Defendant-Appellant-Appellee.

BRIEF FOR PLAINTIFF-APPELLEE-APPELLANT

Preliminary Statement

On March 13, 1975 the defendant, Lani M. Brozyna, was indicted by the Federal Grand Jury in Buffalo, New York, charged in one count with wilfully and knowingly furnishing and exhibiting false identification in connection with the acquisition of a firearm, 18 U.S.C., Section 922(a)(6) and Section 924(a), and in a second count of bail jumping arising out of her failure to appear for a preliminary hearing on a complaint arising from the events set forth in the first count, in violation of 18 U.S.C., Section 3150. Following various motions and pre-trial appearances, a trial was held in August of 1976, with the jury returning verdicts of guilty on both counts. The defendant renewed a motion for a directed verdict of acquittal on Count I, which the Court took under consideration, and on April 21, 1977 Judge Curtin granted the defendant's motion for acquittal on Count I. The basis for the

Court's ruling was that while the indictment charged the defendant with using false identification "in connection with the acquisition of a firearm", the proof at trial showed no actual acquisition, but only *attempted* acquisition. Simply stated, the Court found the evidence did not support a conviction of the crime specified in the indictment (Defendant's Appendix pp. 12, 13).

In his same order, Judge Curtin denied the defendant's motion for severance, denied the defendant's motion for a new trial on Count II and scheduled sentence of the defendant. The defendant ultimately received a suspended sentence and one year's probation.

The defendant appeals from her conviction on Count II; the government appeals from the Judge's decision acquitting the defendant on Count I.[1]

Statement of Facts

Testimony at trial showed that on August 29, 1974 the defendant, Lani M. Brozyna, entered Kings Department Store in Buffalo, New York, and after examining a shotgun told the clerk she wanted to purchase it. As required, the defendant filled out a "firearms transaction record" in the name of one Dorothy Bernys, giving an address, date of birth, height and weight and signature all purporting to be Dorothy Bernys. She also showed the sales clerk a New York State Drivers License and two credit cards in the name of Mrs. Bernys, and when the store personnel questioned her use of the charge card to pay for the gun she left the store without actually

[1] Under *United States vs. Wilson*, 420 U. S. 332 (1974) the government may appeal from the District Judge's decision to acquit the defendant following a guilty verdict by the jury without contravening the double jeopardy clause of the Fifth Amendment.

completing the purchase. The use the false name and identification on the firearms transaction record, which was left with the store clerk, formed a basis for Count I of the indictment.

As a result of the false statement on the firearms record, a complaint was filed against the defendant on September 9, 1974, and on September 11 she was arrested. She appeared before the U.S. Magistrate in Buffalo on that same day, and was released on a $2,500 appearance bond. The Magistrate set a preliminary hearing date for September 25, 1977. This preliminary hearing date was subsequently re-adjourned to November 8, 1974, and when the defendant failed to appear at that time the Magistrate sent letters to her at two separate addresses, re-scheduling the preliminary hearing for November 15, 1974. When the defendant failed to appear on November 15, the Magistrate issued a warrant for her arrest.

On February 27, 1975 the defendant was located and arrested in Santa Anna, California by F.B.I. Agents and Agents with the Bureau of Alcohol, Tobacco and Firearms. She was returned to Buffalo, and on March 13, 1975 an indictment was returned against her charging two counts, the first relating to the false statement on the firearms transaction record, and the second alleging bail jumping for her failure to appear at her preliminary hearing the previous November.

The testimony at trial was essentially uncontradicted. Taking the stand in her own defense, the defendant admitted that she had put false information on the firearms transaction record, and that she had consciously failed to appear for her preliminary hearing. The defendant did not offer any substantial reason for making the false statement on the firearms transaction record, but did justify her failure to appear for her preliminary hearing on the fact that her boyfriend, with

whom she was living, left the Buffalo area at the very end of September, 1974 to avoid a jail term he was facing, and her love for him and his children was more important to her than her obligation to appear for the preliminary hearing. It was this motive for her non-appearance that the defendant advanced as a defense to the bail jumping charge.

GOVERNMENT'S ARGUMENT AS APPELLEE

Joinder of the Firearms Act violation with the bail jumping charge was proper, and the trial court's decision not to order separate trials was correct.

The Defendant argues that Judge Curtin abused his discretion in allowing the two counts in the indictment to be tried together. It is clear that Federal Rules of Criminal Procedure 8(a) allows joinder under certain circumstances, and it is the government's position that Judge Curtin's ruling is a proper exercise of his discretion. Judge Curtin found:

> Under the circumstances, it appeared to the Court that it was not unfair or a violation of the rules to try both counts together. Some evidence admissible on Count II was also appropriate to be heard on Count I.

This was a proper finding by the District Court, and is squarely within the interpretation of Rule 8(a). The decision to join two cases is within the sound discretion of the trial judge. *United States vs. Adams,* 434 F. 2d 756 (2nd Cir. 1970). Clearly, the firearms offense charged in Count I of the indictment, and the bail jumping offense charged in Count II of the indictment are based on the "same act or transaction or on two or more acts or transactions connected together" as required by Rule 8(a). In *United States vs. Quinones,* 516 F. 2d 1309 (1st Cir. 1975), cert den. 96 S. Ct. 97 (1975). The Court upheld the joinder of an escape count with other counts in-

volving entering military property for unlawful purposes, assault, and rape. The *Quinones* Court noted that the escape count resulted from an escape from custody brought about as a direct result of the happenings charged in the other counts for which the defendant was charged; thus, they were deemed "connected together" and joinder in one indictment was proper. *Quinones* at page 1312.

Furthermore, the Courts have imposed a burden on a defendant asking for severance to show "substantial prejudice", and not merely that he might have had a better chance for acquittal had there been separate trials. *U. S. vs. Papadakis,* 510 F. 2d 287 (2nd Cir. 1975); *U. S. vs. Park,* 531 F. 2d 754 (5th Cir. 1976). In this case, it is submitted that the defendant cannot demonstrate such prejudice since separate trials would not necessarily have eliminated references to the facts of the opposing counts. In a trial on the bail jumping charge some evidence on the basic facts of the firearms offense would have been relevant and admissible to prove that defendant had been charged with a specific crime, that the United States Magistrate had informed her of the charge against her, and that she had been instructed to appear for further proceedings on that charge. In a trial of the firearms offense, evidence of defendant's failure to appear, and her flight from the jurisdiction, would be relevant as proof of defendant's guilt. *United States vs. Bourassa,* 411 F. 2d 69 (10th Cir. 1969), cert denied 396 U.S. 915. Furthermore, evidence of flight, like any other circumstantial evidence, has "consistently been admitted as evidence of guilt if considered with other facts of the case." *United States vs. Malizia,* 503 F. 2d 578 (2nd Cir. 1974), cert den. 420 U.S. 912; *U. S. vs. Bourassa, supra; U. S. vs. Ayala,* 307 F. 2d 574 (2nd Cir. 1962). This Circuit has also stated that the trial judge should receive evidence and permit the defendant to deny or explain the

alleged flight from the jurisdiction. *U. S. vs. Alaya, supra.* In the instant case, the defendant fully utilized her opportunity to explain her behavior like taking the stand in her own behalf and testifying as to her reasons for going to California. See also *United States vs. Foutz,* 540 F. 2d 733 (4th Cir. 1976).

Finally, it should be noted that Judge Curtin's instructions to the jury emphasize that the Counts were to be considered separately:

> "The burden is upon the government to prove each element of the crimes charged beyond a reasonable doubt.
>
> The fact that she was charged in one (complaint) before the Magistrate and then eventually in the indictment is not to have any influence upon your judgment in the second count. Again it is part of the fact circumstance. Whether the charge was a good one or a bad one placed before the Magistrate is of no moment. You are to take that as simply one of the circumstances in deciding the issues in Count II, and the government again must prove beyond a reasonable doubt all the elements of Count II, but simply because there was a charge placed against her should not be persuasive to you in any way that she was in fact guilty of that particular charge." (Govt's Appx. pp. 3, 4.)

Later, Judge Curtin again advises the jury:

> "As I have told you before, evidence with respect to Count I of the indictment is not to be considered by you as bearing upon the guilt or innocence of the defendant regarding the second count in the indictment. (Government's Appendix pp. 23, 24.)

And, of course, the defendant's attorney made no objection to this particular admonition by the Judge, nor did he request the Judge to provide any further instructions as to considering the Counts separately.

Therefore, the government argues that the two offenses were correctly joined, any overlap in proof was relevant to both offenses, and there was thus no undue prejudice to the defendant.

Conclusion

The government respectfully urges that the defendant's conviction on Count II be affirmed.

GOVERNMENT'S ARGUMENT AS APPELLANT

It is the government's position that Judge Curtin erred when he granted defendant's post verdict motion for acquittal on Count I. It is argued that the jury's verdict on Count I should have been upheld on the theory that the undisputed facts at trial show the defendant guilty of a "necessarily included offense". The trial court rejected the government's argument to have the necessarily included offense (i.e. *attempted* acquisition) substituted for the original offense on the grounds that:

> "There was no request that the charge of an attempt be submitted to the jury. If the government had sought such a request, it would have been appropriate under the circumstances. . . . But it is necessary that the request be made beforehand." *(Defendant's Appendix,* Page 17.)

POINT I.

The undisputed facts show the defendant guilty of the necessarily included offense of attempted acquisition.

Rule 31(c) of the Federal Rules of Criminal Procedure provides:

(c) Conviction of less offense.

The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

It is argued that the attempted acquisition of a firearm is clearly an offense necessarily included in the offense charged, that is one must first attempt to acquire a firearm before actually acquiring it. The government contends that pursuant to this rule the defendant could have been found guilty by the District Court when the Court reached its conclusion that the offense charged, actual acquisition, had not been proved.

> "It is established that conviction for a lesser included offense can only be considered where some of the elements of the crime charged themselves constitute a lesser crime . . ., and where the greater offense requires the finding of a disputed factual element not required for conviction of the lesser included offense." *U. S. vs. Evans*, 45 FRD 441 (S.D.N.Y. 1968).

See also *Sansone v. United States*, 380 U.S. 343, S. Ct. 1004, 13 L. Ed. 2nd 882 (1965); *Berra v. United States*, 351 U.S. 131, 76 S. Ct. 685, 100 L. Ed. 1013 (1956); *United States v. Markis*, 352 F. 2d 860 (2nd Cir., 1965). It is also required that "the greater offense cannot be committed without also committing the lesser." *Evans, supra.*[2]

The present case falls squarely within Rule 31(c) under either theory, since it is a logical impossibility to commit an

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[2] While references regularly speak of "lesser" included offenses, Rule 31(c) specifically and more precisely refers to "necessarily included" offenses, and the commentaries, cases, and logic all imply that the term "lesser" refers to element of proof, not degrees of punishment. That the sentence may be less for a necessarily included offense should be considered a regrettable coincidence which may encourage this imprecise terminology.

offense involving the acquisition of a firearm without first taking all those measures necessary to constitute the attempted acquisition. It therefore follows that the attempted acquisition of the firearm is an offense for which the defendant could have been found guilty under Rule 31(c). See *United States vs. Marin*, 513 F. 2d 974, 976 (2nd Cir 1975).

POINT II.

A Court may enter a judgment of conviction on a necessarily included offense even where no necessarily included offense instruction has been given to the jury.

The government argues that a conviction for the attempted acquisition of the firearm involved here may be entered whether or not an instruction regarding the necessarily included offense was given to the jury. In *United States vs. Swiderski*, 548 F. 2d, 445, 452 (2nd Cir. 1977), this Court held that the jury, after determining the defendant's guilt on a greater narcotics offense, based on erroneous instructions as to the definition of intent to distribute, "necessarily found" all of the elements of a lesser included offense, *although the jury was never instructed on this lesser offense*. In spite of this lack of a jury instruction, the Court nonetheless amended the conviction to the lesser included offense, stating that the defendant would not be prejudiced thereby. The Court recognized that the facts at trial supported a conviction for the lesser included offense of mere possession, and agreed with the government that the appropriate remedy would not be a reversal with a new trial, but rather a remand with directions to the District Court to amend the judgment to reflect a conviction for the simple possession charge and to resentence the defendants. This is essentially what the govern-

ment asks in this case. And it is clear that the Court of Appeals has the power to take such steps. *U. S. vs. Swiderski, supra,* 28 U.S.C., Section 2106, *Austin vs. United States,* 127 U.S. App.DC 180, 382 F. 2d 129, 142 (1967).

It would appear that the only limitation on this right to convict of a lesser included offense in the absence of a jury instruction is that the defendant must be informed of the charges against him "with sufficient particularity to allow him to prepare his defense", *United States vs. Thomas,* 444 F. 2d 919, 925 (DC Cir. 1971), in order that "no undue prejudice will result to the accused". *Austin, supra* at page 142.

In the present case this exception does not apply. The evidence clearly shows that the defendant was well aware of the possibility of being charged with the offense relating to attempted acquisition, both from the government's affidavit, supplied to the defendant over a year before trial (Defendant's Appendix Page 10), and the undisputed evidence at trial. She therefore had the opportunity to offer her complete defense on this necessarily included charge. The government thereby contends that the defendant would not be unduly prejudiced by this Court's Order of conviction of the necessarily included offense, all of the elements of which were fairly found in the prosecution's favor by the jury. See also *United States vs. Swiderski, supra.*

Conclusion

For all of these reasons, the government respectfully urges that the Judge's decision acquitting the defendant on Count I be reversed, and that this case be remanded to the District Court with directions to amend the judgment to reflect a conviction for the necessarily included offense of attempted

acquisition under 18 U.S.C., Section 922(a)(6), and for sentencing thereon.

Respectfully submitted,

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GOVERNMENT'S APPENDIX.

CHARGE OF THE COURT

THE COURT: At this time, ladies and gentlemen, it is my job to charge you on the law which applies to this case. It is your obligation to accept the law as I charge it to you and apply it to the facts which you find have been proven to your satisfaction. You may consider the testimony of the witnesses and the exhibits which have been entered into evidence in this case and any stipulations which have been agreed to by the attorneys in the case. If there are some exhibits which are not sent to you, that means that you should not consider them, that because of some rule or understanding they will not be sent to you.

In your deliberations you should listen to the reasoned suggestions of your fellow jurors and you should give your own carefully reasoned ideas and suggestions. This case should not be decided on any consideration of bias, prejudice, sympathy or any other improper

motive. Considerations of what the sentence would be or could be should not enter into your consideration. That is for the Court to decide under the law.

We must keep in mind also that we are only dealing here, - we are not social workers, we are not reformers, we are only here to deal as a court and a jury with two particular federal statutes. If you find that Lani Brozyna, for example, as far as the credit card is concerned, if she had the credit card improperly, if she used the credit card improperly, but on the other hand you do not find that the particular violation charged in this count and under this particular section of the Federal Law was violated, then it is your absolute duty to acquit. Naturally the circumstances of the use of the credit card must be considered because it is part of the whole picture of the case, but she is not here charged with that particular offense.

The fact that she had pled guilty in a state court is not to be of any

convincing evidence to you at all. In fact, the plea is something else. There are different considerations there and a different charge there and that in itself is not to weigh upon your mind in judging the issues before you.

Whether or not, - I agree with Mr. Heller in this respect. Whether or not she is a good person or a bad person or whether she is living as people in the neighborhood or in the community believe that people ought to live; whether she is living in wedlock or out of wedlock is not of any concern to us at all. We are only to consider the particular charge placed before us in these two counts.

She has no burden of explanation. She was not required to take the stand. She was not required to testify or offer any evidence at all. The burden is upon the Government to prove each element of the crimes charged beyond a reasonable doubt.

The fact that she was charged in

one before the Magistrate and then eventually in the indictment is not to have any influence upon your judgment in the second count. Again it is part of the fact circumstance. Whether the charge was a good one or a bad one placed before the Magistrate is of no moment. You are to take that as simply one of the circumstances in deciding the issues in Count 2, and the Government again must prove beyond a reasonable doubt all the elements of Count 2, but simply because there was a charge placed against her should not be persuasive to you in any way that she was in fact guilty of that particular charge.

In deciding the issues in any case, we usually talk about the fact that the jury may consider direct and circumstantial evidence. Direct evidence is what a witness saw or heard, what a witness observed, the exhibits which are in evidence, the form that was filled out, the writing on the form. You certainly may consider all of these things if you find that the evidence is persuasive.

Also you may consider circumstantial evidence. In determining some of the issues in the case that might be important in this case, whether or not the acts taken by Mrs. Brozyna were willful or not. It is hard to look into a person's mind and find actually what is going on there. We must look at what a person did or said to determine what the action of a person's mind is, whether an action was willful or not, whether it was simply careless or not. From facts which you find have been proven, therefore, you may infer circumstantially the other facts, but you must use this kind of evidence, circumstantial evidence with care. If you find two reasonable inferences which flow from a set of facts, then it is your obligation to take the inference which points to innocence rather than the one that points to guilt.

There are many examples which maybe some of us we have talked before. In the Buffalo area the snow on the ground. After a winter's evening, in the morning,

dry before, in the morning we arise and we find there is snow on the ground. We did not see it snow but we infer. We can reasonably say that it must have snowed during the evening. On the other hand, if we were gone for a few days, we could infer that it snowed while we were gone, but we would not be able to say with accuracy without any further information when it did snow, so that circumstantial evidence may be used just as you use it in your everday activities, but it must be used with care. It can only be used reasonably.

In making up your mind about the evidence, certainly you will turn your attention to the testimony of the witnesses who have testified. In that respect you should carefully scrutinize the testimony given by all the witnesses, the circumstances under which the witness testified, and certainly my remarks here go to all the witnesses in the case, including the defendant herself who did testify. In your consideration of their testimony you

may consider every matter in evidence which tends to show whether the witness is worthy of belief. You should consider the witness' intelligence, motive, state of mind, demeanor or manner while on the stand. You should consider the witness' ability to observe the matters to which he or she testified, whether he impresses you as having an accurate recollection of what occurred. Consider any relation that the witness may have to either side of the case; any hope of reward, any reason for bias or prejudice or slanting the evidence one way or another. You should consider the extent which if at all a witness is either supported or contradicted by other evidence in the case. You should consider certainly not only direct examination of the witnesses, but also the cross examination.

Now, inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit the testimony. Two or more persons recalling

or witnessing a particular event may have different recollections. In weighing the effect of this kind of discrepancy always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood.

A witness may be discredited by contradictory evidence or by evidence that at some other time the witness said or did something or has failed to do something which is inconsistent with the witness' presentation. If you believe that the witness has been impeached and thus discredited, it is your province to give the testimony such weight as you believe it deserves. If a witness knowingly testified falsely in connection with any matter, you have a right to distrust the witness' testimony in other particulars and you may reject all of the testimony of that witness if you find that the witness deliberately testified falsely as to any material fact in the

case.

As I have said to you again and again, the defendant in this case is presumed innocent until proven guilty beyond a reasonable doubt. It is well to consider in detail for a few minutes what we mean by these phrases. A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. Of course, it is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt, therefore, is established if the evidence is such as you would be willing to act upon it in the most important of your own affairs. A defendant, however, is never to be convicted upon suspicion, conjecture, guess, surmise, speculation. A reasonable doubt may arise not only from the evidence produced but also from the lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged,

a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution.

The law does not impose upon a defendant the duty of producing any evidence. A reasonable doubt is such a doubt as is based upon reason and as appeals to your power of logic. It is a doubt arising out of something tangible in the evidence in the case or something lacking in the case.

If you feel uncertain and not fully convinced that a defendant is guilty of the crime charged and you believe you are acting in a reasonable manner and you believe a reasonable man or woman in any matter of like importance would hesitate to convict because of such a doubt as you have, that is a reasonable doubt to the benefit of which the defendant is entitled. If you have such a doubt, you must acquit.

To turn to the particular counts here in the indictment, we should discuss them briefly with you at this time. Count 1 of the indictment, and by the way, we will deliver the indictment to you as a guide in your deliberation. When you come back into court it is a good idea to pick a member of your group, body as a foreman and it will be the foreman's job to answer orally when questioned by Mr. White about the verdict.

As I told you before, the indictment is not any evidence of any criminal conduct on the part of the accused. The purpose of the indictment is to let an accused know for what he is charged so that he can prepare a defense and so that he will not be charged in a second instance for the same acts.

Your vote must be unanimous vote. That is all jurors concurring in the verdict. If you have a question during your deliberation about anything, you should not try to communicate with anyone except by giving a note to the Marshal.

The Marshal will deliver the note to the Court and then we will have you come into court with the attorneys and the defendant present and we will resolve the difficulty.

As far as Count 1 is concerned, Count 1 charges that on or about the 29th day of August, 1974 in the City of Buffalo, Western District of New York that Lani M. Brozyna, in connection with the acquisition of a firearm from a licensed dealer in firearms willfully and knowingly furnished and exhibited a false, fictitious and misrepresented identification intended and likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm pursuant to Chapter 44, Title 18, United States Code, in that she represented herself to be Dorothy Bernys, all in violation of certain sections of the United States Code.

The sections that we are concerned here with mostly, briefly and stated in part, Title 18, Section 922(a)(6), this

makes it a federal offense for any person in connection with the acquisition, and I'm not going to read the whole section, but the part that applies, for any person in connection with the acquisition of any firearm from a licensed dealer to make, to furnish or exhibit any false, fictitious or misrepresented identification intended or likely to deceive such dealer with respect to any fact material to the lawfulness of the sale of such firearm under the provisions of this chapter.

In this case the Government must prove certain elements to your satisfaction beyond a reasonable doubt. The Government must prove that in connection with the acquisition of a firearm from a dealer licensed to sell firearms under the Gun Control Act the defendant knowingly exhibited a false, fictitious or misrepresented identification. Secondly, that the false, fictitious or misrepresented identification was intended or likely to deceive the dealer with respect to any

fact material to the lawfulness of the sale. You must find beyond a reasonable doubt that the acts of the defendant here in this particular count were done willfully, knowingly and unlawfully. That is with a specific intent to disregard or to violate the law.

You must find beyond a reasonable doubt that the store in question was in fact a licensed dealer of firearms. You must find beyond a reasonable doubt that Lani Brozyna at the time and place willfully and knowingly furnished and exhibited a false, fictitious and misrepresented identification intended and likely to deceive such dealer and in respect to all this you recall all the testimony. You may consider the exhibits and the testimony of the store clerks and everyone else in connection with the sale.

You must find beyond a reasonable doubt that the misrepresentation was with respect to a material fact as to the lawfulness of the sale and that the

defendant represented herself to be a person known as Dorothy Bernys.

There are certain words which I believe bear a little bit further definition. Misrepresentation of the defendant's true identity is a misrepresentation of a fact material to the lawfulness of the sale, that the defendant could have lawfully acquired a firearm in her own name is no defense in a prosecution under this section if in fact you find that she represented herself to be another.

It is in the words "in connection with the acquisition of a firearm", I think I agree with a good deal of what Mr. Heller said, but in connection, - in the definition of these words I think that you will find that we part company. The words "in connection with the acquisition" do not mean that the defendant actually acquired or came into possession of the firearm. An acquisition has been defined as the act of becoming the owner or possessor of certain property. The crime charged here is in connection with

the acquisition. That is one of the elements of the crime and it does not mean that she actually acquired or came into possession of the firearm. It does mean that she must have taken all steps necessary to complete the sale, that she had gone as far as she could in order to complete the sale of this firearm and the sale would have been completed had it not been for the action of the store employees in refusing to honor the credit card.

Perhaps this is stated in similar language but maybe in a little bit different way. You need not find that a final sale occurred. The words, "in connection with an acquisition" referred to all elements of the purchase and sale process. You must find that the defendant made false statements on the Treasury form required by law to be given to the store and she took all the other steps necessary to complete the purchase of the firearm as far as she could take it and simply that the sale

did not come about because of the action of the store employees.

As far as the word "firearm" is concerned, you will recall yesterday we discussed the meaning of the word "firearm" under this particular statute. The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive and then there are certain exceptions which I will discuss with you in a minute.

Whether the weapon which was involved at the store which is in evidence here is a firearm within the meaning of the law is for you to decide and you must find that it is included within the following definition: A firearm is a weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosion, except for a shotgun which the Secretary of the Treasury finds is generally recognized as particularly suitable for sporting purposes which will or which may

be readily converted to expel a projectile by the action of an explosive or other propellant.

With respect to this exception, such shotguns are exempt from the definition only if you find that the Secretary of the Treasury has made a regulation or a finding that a certain weapon is generally recognized as particularly suitable for sporting purposes. The absence of such a finding by the Secretary or such a regulation promulgated by the Secretary if proved to you beyond a reasonable doubt would then result in this shotgun being included within the definition of "firearm". In this respect whether or not there was any, you will recall the testimony of Mr. Kern. I think it is obvious that he said that he checked with his superiors and that they could find no such regulation. It is up to you to accept this only if you find that it satisfies you that the inquiry was sufficient enough and as I explained to you, you will recall my discussion

yesterday that it is always difficult to prove a negative and that certainly as far as Mr. Kern in the ordinary course of his duties that he would check and be bound by the instructions which he receives and the information he receives from his superior office, superior officers in Washington.

We may now proceed to Count 2. This count charges that on or about the 15th day of November 1974 that in the City of Buffalo, Western District of New York, that Lani M. Brozyna, having been previously arrested on a charge of violating Title 18, United States Code and so forth and so on, and having been admitted to bail pursuant to the provisions of the Code for appearance before the United States Magistrate for preliminary hearing in a certain case, willfully did fail to appear as required before the aforementioned committing Magistrate. As I have said to you before, the Government is required to prove beyond a reasonable doubt that the charge had

been placed against the defendant but the fact that a charge had been placed is not to be persuasive to you in voting a verdict of guilty, that in itself. It is one of the elements which the Government must prove.

In this connection, in connection with Count 2 in order to convict the defendant, you must find beyond a reasonable doubt that she in fact had been charged with a crime as described in the indictment. Secondly, that the defendant was released from custody by the United States Magistrate under the Bail Reform Act. Thirdly, that as a condition of defendant's release from custody she was required to appear before the Court at a later date and that she was so informed by the United States Magistrate authorizing the release.

The Government must prove beyond a reasonable doubt that the defendant was advised of the penalties for failure to comply with the conditions of her release, including the penalty for failure to

appear in court at a later date and that the defendant did willfully fail to appear as required by the conditions of her release from custody and she failed to appear on or about the time charged in the indictment. It is not necessary for the Government to prove the exact date, that this is a continuing obligation to appear and if she made herself, put herself in such a position that she could not appear on the particular date, it is sufficient if the Government prove on or about the time charged in the indictment.

A willful failure to appear as directed may not be inferred solely from the defendant's non-appearance. However, the defendant's knowledge that her presence in court was required will permit you to conclude that the defendant's failure to appear in court was willful and not the result of inadvertence or excusable mistake.

You will recall earlier my comments about circumstantial evidence and in this case here as to what activities, what

the defendant did, what actions were taken in response to the order, you may consider all of these things.

You need not find that the defendant had actual notice of the date upon which she was required to appear in court, - you remember there were several adjournments of her appearance, - if you find that the defendant's deliberate conduct has rendered unsuccessful a diligent effort to notify her. That is, if you find the defendant deliberately and knowingly prevented the receipt of notice sent to her, then it is sufficient to find that the defendant's conduct is willful. We had evidence here, it is clear, that one notice went to an incorrect address and that certainly is not notice to any defendant, but it is up to you to decide whether or not other notices went to a correct address, whether the Magistrate took steps which were diligent and so that a notice went to the defendant but that she avoided the notice by leaving the jurisdiction of the court.

Certainly you can keep in mind the direction given to her by the Magistrate as to the confines of her bail. That is Western District of New York, and if you find that she left the particular area and this was done in a willful, deliberate effort not to appear at the time and place directed by the Magistrate, then you may find that that element is satisfied. The defendant cannot avoid the responsibility to appear in court by willfully becoming a fugitive from justice.

In talking about willful, that means that it must be deliberately, consciously done; her actions must be purposeful; they must be thought out. They cannot be the result of simple negligence or even gross negligence. You must find that she took a definite step well planned out and deliberate to avoid the direction of the court.

As I have told you before, evidence with respect to Count 1 of the indictment is not to be considered by you as bearing

upon the guilt or innocence of the defendant regarding the second count in the indictment. It is not sufficient for the Government to prove that defendant failed to appear at a given date. In order to find the defendant guilty on the second count, you must find that the evidence demonstrates beyond a reasonable doubt that such failure was willful. You may consider evidence bearing on the defendant's state of mind when she left, what her motive was for going to California in deciding whether the defendant's failure to appear was willful. If you find that the statements made by her to the agent in California were voluntarily made, were made without any coercion, were freely given, then you may consider as part of the evidence whatever she said to the agent as bearing upon her willfulness in leaving.

As far as her motive for going to California, and you have heard the argument on that, she may not use as an excuse simply, "Well, I would rather be

in California with my friend and my children in a different climate", and so forth, "than going up before the Magistrate". It may not be used as a simple excuse, but if you find from all the circumstances in the case that the events, the circumstances, her state of mind, her motive would take away sufficiently from her actions so that you find that under the circumstances that her action taken was not willful, not deliberate, then, of course, the Government would have failed to comply with this element of the crime charged so that you may consider her explanation as part of the evidence, but if you find under all the circumstances that she had thought about it, she had considered it but nevertheless she just willfully made up her mind to leav and used it simply as an excuse, this is not sufficient to excuse her conduct.

I will at this time, ladies and gentlemen, ask you to step into the corridor so I can listen to the further

requests or exceptions to the charge by the attorneys.

(Jury escorted from the courtroom.)

THE COURT: Mr. Wagner, do you have any exceptions or requests?

MR. WAGNER: I do not, your Honor.

THE COURT: All right. Mr. Heller, any exceptions or requests?

MR. HELLER: Yes, your Honor. Your Honor stated and it was in a manner I think of dramatic emphasis that you agreed with a great many things that Mr. Heller said but when we get to the word "acquisition" we part company, and then your Honor proceeded to tell the jury and I am paraphrasing, that a final sale is not necessary, that she had done everything she could have done to complete the sale, that the sale was not consummated only by the action of the store employees and in reading the statute your Honor left out the phrase "attempted acquisition". I relied on the language that the Court indicated it

was going to charge with respect to acquisition when I summed up and summed up on what I thought was left to me that the sale had not been completed because she was not capable of paying for it and I think that the language your Honor used just took the struts right out from under me.

THE COURT: Mr. Heller, I recall it the other way. Mr. Wagner.

MR. WAGNER: Your Honor, I agree with your Honor, and first of all, if you charged "attempted acquisition", it would have confused the jury. It is not the charge here and my understanding was that you set forth to the jury exactly what you explained to us prior to the instruction being given.

THE COURT: Before, Mr. Heller, I am sure that I told you. As a matter of fact, I thought Mr. Wagner's charge put emphasis on acquisition was the wrong one and I am sure that I told you beforehand that in my judgment in connection with the acquisition meant it was not necessary

the actual sale be completed and so I simply refuse to make any further charge to the jury along these lines.

MR. HELLER: Well, perhaps I didn't make myself clear, your Honor. I think that you told the jury that certain facts had been established that the sale, - well --

THE COURT: I said --

MR. HELLER: You drew, for example, it appeared to me, and it sounded to me as if you were telling the jury that the sale --

THE COURT: That is a different point.

MR. HELLER: -- was not and did not have to be consummated. Well, it is a different point, your Honor, but I do mean to make both points. First, that I think that the charge leaves no room between, for example, an attempted acquisition and an acquisition and secondly, I think that the Court did tell the jury that certain facts had been established with respect to the progress of the acquisition.

THE COURT: That is true. I do not believe I left it in that way because I told the jury again the facts are for the jury to

determine but I will state to them again that they are to determine the facts, what happened in the store, what the conversations were, what occurred, that is up to them, the facts, and they are to apply the facts to the law as I charge it.

Anything else, Mr. Heller?

MR. HELLER: No. That is it, your Honor.

THE COURT: All right, Mr. Hoffarth.

(Jury returns to the courtroom.)

THE BAILIFF: One of the jurors has to go to the bathroom.

THE COURT: Why not say you are excused and come right back.

(Alternate Juror Number 1 escorted from the courtroom.)

THE COURT: One of the jurors excused is an alternate, not that we do not hold our alternates in high regard, but I think we can go ahead now without his presence

here.

Ladies and gentlemen, again and again I want to emphasize that the facts are for you to determine and I certainly, - that is not only the law but that is certainly what I wanted to imply to you during my charge.

During the discussion of certain parts of the case, for example when I tried to define to you what the words "connection with acquisition" meant when commenting upon the facts, and perhaps I made certain assumptions about the facts, but I want to again emphasize that the facts are for you to determine, so what happened in the store, what the conversations were, how the form was filled out, what was done with the form, whatever happened as far as the credit card was concerned, those are all facts for you to determine and as far as my comments upon them, If you feel that I give too much emphasis to one and not another, then you simply disregard what I told you about the facts. The facts

are for you to determine and not the Court.

We should wait a minute until Mr. Hoffarth returns and we will have the Marshal sworn.

(Alternate juror Number 1 returns to the courtroom.)

THE COURT: Mr. Hoffarth, could you and your brother Assistant Marshal step up, please.

(One male and one female Deputy United States Marshal sworn as custodians of the jury.)

THE COURT: Ladies and gentlemen, we will deliver the indictment to you and the exhibits. They will be delivered to you in the jury room and then you can begin your deliberation. Mr. Skubinski and Mrs. Cundy, we thank you very much for your service in this case. You are now excused. We will ask you to come

back on September 14th and we will send a notice. Mr. White will send a notice. We will send a confirming notice but you are now excused until September 14th when we will select some more jurors. Thank you.

(Two alternate jurors excused.)

THE COURT: All right, ladies and gentlemen, you may go with the Marshal and begin your deliberation.

(Jury retires to commence its deliberation at 11:31 a.m.)

THE COURT: Mr. Wagner and Mr. Heller, can you stay a minute with Mr. White to make sure that the exhibits we send are the right ones and then tell Mr. White where he may contact you if you are leaving.

MR. WAGNER: Judge, can I ask one thing, not this case but with Mr. Heller present

THE COURT: Yes.

AFFIDAVIT OF SERVICE BY MAIL

RE: United States
vs
Lani M. Brozyna

No. 77-1238

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 19th day of September, 1977 I mailed _____ copies of a printed Appellee Brief & Appendix in the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
United States Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Edward Heller, Esq.
930 Walbridge Building
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara, United States Attorney, Att: Edward J. Wagner, Esq. Assistant U.S. Attorney

502 U.S. Court House, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this
19th day of September, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 78